113-57

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

(No. 935.)

EUGENE J. A. DRENNEN, FREDERICK W. STARR, AND EDWARD D. EVERETT, Partners as DRENNEN, STARR & EVERETT, *Plaintiffs in Error*,

vs.

THE LONDON ASSURANCE CORPORATION, *Defendant in Error.*

PHILADELPHIA ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF DEFENDANTS IN ERROR.

CAMERON, LOSEY & BUNN,
C. K. DAVIS,
Counsel for Defendants in Error.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This suit was brought by the plaintiffs in error upon two policies of insurance issued March 10, 1883, each of which contains following conditions:

"Or if the property be sold or transferred, or any change takes place in title or possession, (except by succession by reason of the death of the insured,) whether by legal process or judicial decree or voluntary transfer or conveyance, * * * without written permission in this policy, then, and in every such case, this policy shall be void."

Folio 19, p. 6.

"If the interests of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the corporation, and so expressed in the written part of this policy, otherwise the policy shall be void. When the property has been sold and delivered, or otherwise disposed of, so that all interest and liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured."

Folio 19, p. 7, par. 4.

The answer denied the copartnership of the plaintiffs at the time of the fire, which occurred July 29, 1883, or at any time subsequent to May 24, 1883, and alleged that on or about the twenty-fourth day of May, 1883, the plaintiffs became copartners with one David M. Arndt, under the firm name of Drennen, Starr & Everett, in the property insured, and that they and said David M. Arndt have ever since continued to be such partners, and that David M. Arndt is a necessary party to this action. The answer also set up the above-recited conditions in the policy, and that on May 24, 1883, the policies became void by the admission of said David M. Arndt as copartner; that thereby plaintiffs sold, transferred, and assigned to said David M. Arndt a joint interest with them as copartner in the insured property, and that he was admitted into copartnership by the plaintiffs, and took possession of said property jointly with the plaintiffs, and thereby the plaintiffs' title, interest, and possession were changed by their voluntary acts, without the knowledge or consent of this defendant.

Folios 53 to 55, p. 23.

The action was tried before Justice Miller and a jury, and verdict was had for the defendant, whereupon the following bill of exceptions was settled.

Folios 68 to 82, pp. 27 to 31.

The above-entitled cause came on for hearing in the above-named court at the June general term for the year 1884 thereof, to-wit, on the thirtieth day of June, A. D. 1884, before the Honorable Samuel

F. Miller, judge, and a jury, upon the issues joined upon, and by the pleadings, to-wit, the complaint, answer, and reply.

The case was opened to the jury by J. M. Shaw, Esq., of counsel for the plaintiffs.

Thereupon it was stipulated and agreed in open court by the counsel for defendant, to-wit, C. K. Davis, Esq., and Messrs. Cameron, Losey & Bunn, that the defendant would withdraw and abandon the defense set up in its answer of alleged fraudulent overvaluation of the property insured and destroyed, and would rely upon the alleged defense of the avoidance of the policies by change of interest and title or possession in and to the insured property after the delivery of said policies alone; and it was further admitted by defendant that the contracts and policies of insurance had been made and delivered, and that, at the time of such making and delivery, the plaintiffs were the sole owners of the property thereby insured; and that the fire had occurred, and that thereby of the goods and property described in said policies there had been destroyed the amount and value as alleged in the complaint; and that the plaintiffs had given due notice and furnished to defendant due and formal proofs of said alleged loss; also, that there were other policies of insurance upon the same property held by plaintiffs at the time of said fire and destruction, amounting to ninety-one thousand dollars, as alleged in the complaint and answer.

The plaintiff thereupon rested.

The case was thereupon opened to the jury on behalf of defendant by C. K. Davis, Esq., of counsel for defendant.

The defendant, to sustain the said issue and defense upon its part, thereupon offered in evidence the said two policies of insurance, a true copy of each of which is annexed to the complaint herein, which were received.

It was testified by Allie O'Brien, a witness for defendant, and the book-keeper of plaintiffs, that on the eighteenth day of June, A. D. 1883, said plaintiffs received from David M. Arndt, mentioned in the pleadings, the sum of five thousand dollars in money, which said sum was thereupon placed to the credit of said David M. Arndt's individual name upon the account-books of said plaintiffs, and was by plaintiffs deposited in their bank. That on the third day of July, A. D.

1883, said Arndt made and delivered to plaintiffs his promissory note for five thousand dollars, payable eighteen months after date, which was also entered upon the account-books of plaintiffs to the credit of said David M. Arndt's individual name, and was received by plaintiffs as other bills receivable received by plaintiffs in their business.

It was further testified by E. J. A. Drennan, one of the plaintiffs, and admitted that said David M. Arndt came from his home in Sandusky, Ohio, to Minneapolis, Minnesota, the place of business of said plaintiffs, and was first introduced to and became known to the plaintiffs, E. J. A. Drennan and Frederick W. Starr, on or about the twentieth day of May, A. D. 1883. That thereupon negotiations were entered into between said Drennan and Starr, acting for the plaintiffs, and said Arndt concerning the forming of business relations, which negotiations resulted on the twenty-fourth day of said May in the making and signing of a written agreement, in words and figures as follows, to-wit:

This agreement, made and entered into this twenty-fourth day of May, A. D. 1833, by and between E. J. A. Drennan, F. W. Starr, and Edward D. Everett, who are now members of and constitute the firm of Drennan, Starr & Everett, all of the city of Minneapolis, Minnesota, parties of the first part, and D. M. Arndt, of the city of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part hereby agree to receive into their business said Arndt on the following terms and conditions:

First—Said company is to become incorporated.

Second—Said Arndt is to pay into said firm for its use, on or before June 14, 1883, five thousand dollars.

Third—Said Arndt is to pay into said firm for its use, on or before January 1, 1885, an additional sum of five thousand dollars.

Fourth—Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum on each of said sums of five thousand dollars from January 1, 1883, till each of said sums shall be paid as aforesaid; the interest on last-mentioned sum to be paid semi-annually.

Fifth—If said Arndt shall be unable to pay said second $5,000 by January 1, 1885, his interest shall be decreased 50 per cent., and until said last-mentioned sum of $5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor shall be evidenced by his promissory note executed to said firm bearing interest as aforesaid, and dated January 1, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the

same nature as that now conducted by Drennen, Starr & Everett. The name of the new company to be formed shall be determined hereafter.

It is understood and agreed that of the effects and rights of the firm of Drennen, Starr & Everett, said Drennen owns one-half, and said Starr and Everett each one-fourth thereof. All said rights and effects shall be put into the corporation to be formed as aforesaid, at their value as shown by the inventory taken January 1, 1883, less any loss by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added said sum of ten thousand dollars to be paid by said Arndt as aforesaid.

The interest and shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock according to the plan aforesaid.

When a charter shall be procured as aforesaid, 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed.

In testimony whereof, said parties hereto set their signatures, the day and year first herein written.

E. J. A. DRENNEN.
FRED. W. STARR.
DAVID M. ARNDT.

That said Edward D. Everett, one of said plaintiffs, was, at and during the time of the said negotiations and the making and signing of said contract, absent from said Minneapolis, but returned soon afterwards, and was made acquainted by his partners with the making and contents of said written agreement; that this was the final agreement between said plaintiffs and said Arndt; that immediately after the making and signing of said written agreement said Arndt went to said Sandusky, Ohio, and returned therefrom again to said Minneapolis about the seventeenth day of June, 1883, after the said return of said Everett, and after the said Everett had received the aforesaid information, and thereafter delivered the money and note received by plaintiffs, as testified by the witness O'Brien; that said money and note were so delivered by said Arndt and received by said

plaintiffs under and pursuant to and by virtue of the conditions of said agreement, and not otherwise.

Upon the foregoing admissions and testimony, which was all that was received or considered on said trial, the plaintiffs prayed the court to charge the jury that the making of said written agreement between said plaintiffs and the said D. M. Arndt, and the subsequent reception of said money and note by plaintiffs thereunder, and entry upon the books as testified, would not and did not constitute said David M. Arndt a partner with said plaintiffs, as between themselves, and did not have the effect to assign or transfer to said Arndt any title or interest in the goods and property insured in and by said policies of insurance.

The court refused so to charge, but charged the jury that said agreement so signed, if assented to by said Everett, and the receipt by said plaintiffs of said money and note, and the credit thereof by them in their books to said Arndt, would and did constitute said Arndt a partner with said plaintiffs, as between themselves, from the time of the receipt by plaintiffs of said money, and had the effect then to convey and transfer to and vest in said Arndt a joint and undivided interest and title with said plaintiffs in said insured property.

To which refusal to charge as requested said plaintiffs then and there duly excepted, and said exception was duly noted and allowed, and to said charge of said court as given, and to each and every part thereof, said plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The plaintiffs further prayed the court to charge the jury that if, after the making of said policies and before said loss, there had been a copartnership relation created between said plaintiffs and said Arndt, whereby there had been transferred and conveyed to said Arndt a joint and undivided interest and title with said plaintiffs in the said insured property, such fact would not have the effect to wholly avoid said policies of insurance, but that said plaintiffs might still recover at least a proportionate amount upon the policies sued upon, to the extent of their remainining title and interest in said insured property. The court refused so to charge, but charged the jury that, under the conditions of said policies, any change in the title or pos-

session of the insured property by voluntary assignment or transfer, after the delivery of said policies, without the assent of defendant, would operate as an entire avoidance of said policies, and that if the plaintiffs had received said Arndt into their firm as a partner, so as to transfer and assign to and vest in him a joint and undivided interest and title with them in the insured property, that was such a change of interest and title as was within the conditions of said policies, and would operate as an entire avoidance of them, and would be a bar to any recovery by plaintiffs; and that, if such was the fact, their verdict must be for the defendant.

To which refusal to charge as requested said plaintiffs then and there duly excepted, and said exception was duly noted and allowed, and to the said charge as given by the court, and to each and every part thereof, the plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The jury thereupon, on the second day of July A. D. 1884, rendered a verdict in said cause for defendant. Whereupon the plaintiffs prayed for a bill of exceptions.

And whereas, none of the aforesaid matters are of record, the above bill of exceptions is duly allowed, signed, and sealed during the term, this fifth day of July, A. D. 1884.

SAM. F. MILLER, Judge. [Seal.]

In disposing of the case the court delivered the following opinion, (volume 20, Fed. Rep. p. 657:)

MILLER, *Justice*. This case was argued upon certain questions of law. It seems that the plaintiffs, who had brought the suit upon two policies of the London Assurance Corporation, were, at the time the policies were made, the owners of a stock of goods in Minneapolis, which was the subject of the insurance. The loss by fire is apparently admitted as stated, and the only issue raised by the defense grows out of two conditions of the policies, which are supposed to relate to the same subject. One of these conditions is, that "if the property insured be sold or transferred, or any change takes place in the title, except by succession by reason of the death of the assured, whether by legal or judicial process, or voluntary transfer or convey-

ance, this policy shall be void." The other provision is, that "if the interest of the assured in the property be any other than entire, unconditional, and sole ownership in the property, for the use and benefit of the assured, or if the building insured stands upon leased ground, or the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, this insurance upon all such property shall immediately terminate."

A point raised by the plaintiffs in the construction of this policy is that the clause I have read last, in the fourth paragraph of this insurance policy, is a limitation and a qualification of the one I have first read. The first one is, "and if the property be sold or transferred, or any change takes place in the title or possession, then the policy is void." The last one is, that "when the property has been sold and delivered, or otherwise disposed of, so that the liability of the assured has ceased, this insurance shall terminate." I do not think that they have anything to do with each other. They relate to distinct phases of what may be done by the owners of the property after the insurance policies are executed. The latter does but little more than explain and qualify the universal principle of law, that, when a man has insured property and ceases to be the owner, or have any interest in it, although it may be burned during the life of the policy, he cannot recover anything, for the obvious reason that he has nothing to recover; he has no interest in the property; he has sustained no loss, and therefore can recover nothing. That has been decided over and over again. It is also one of the conditions of these policies, in order to prevent their assignment without the consent of the insurance company, that, when a man sells and parts with his title and ownership of the property, he ceases to be insured, and has nothing to insure, and if the property is burned, it is somebody else's property. This provision in question has relation to that, and is intended to qualify, and to some extent, perhaps, to limit, the common law, for if it is sold and not delivered, he probably could recover.

"When the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, this insurance upon such property shall immediately ter-

minate." This is rather for the benefit of the assured; a sale of part of the property does not forfeit his right to insurance on the balance. Possibly a sale without a delivery, if delivery was essential, would not forfeit his insurance; but this relates simply to a sale of property in whole or in part, and is intended to qualify the rule of the law that would prevail without it.

The other relates to a different affair: "If the property be sold or transferred, or any change takes place in the title or possession." Many changes may take place in the title and also in the possession without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change. It remains where it was; the title remains, perhaps, in the firm, although one member of the firm may have gone out. But the question we have to solve is, whether the introduction of a new partner into the partnership firm whose goods are insured is such a change as vests him with an interest which he did not have before, and vests another man with a right of control of the possession and to have charge of the property, and will avoid this policy. Without going on to cite the authorities, we are both of the opinion that this is such a change as by that language was intended to avoid or forfeit the policy.

The sale or transmutation of the various interests between the partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, does avoid the policy.

There are two things with regard to which insurers are always cautious, tenacious, and anxious. One of them is the character of the men with whom they make the contract, and the other is the character of the man who has possession of the property, especially if it be movable property that is insured; and it is easy to see why this is so. They may very well know that the man or men with whom they deal when the contract is made, are cautious business men, honest, and for a long time successful in business. With those men they contract without hesitation. They have the right to know who those men are with whom they contract, and the character of the men with

whom they contract with regard to the possession of the property. They make a contract with A. because they know him, or because they have heard of his character; because they understand that he is honest and fair, and they deal with him just as you deal with one whom you know to be reliable. You will seek to deal with honest men only. Now, it is against all the principles of contracts to say that in dealing with one man or two men, that those two can afterwards, acting without the consent of the other party, introduce another man into the contract, who has all the rights and all the control which those two had before, because that man may be a scoundrel, may be known to be a scoundrel by the insurance company; and if that rule prevails the other parties have a right to introduce the veriest scum of the earth, and men who have a half dozen times been engaged in the destruction of property to get the insurance. So, you may sell the goods insured, but you cannot sell the policy unless the company agrees to it. We are of the opinion that if Mr. Arndt was, within the meaning of that policy, introduced into that partnership and became a member of it before the loss, and acquired an interest in the goods, that the policy was forfeited.

The question whether he was so introduced, as presented to the jury and the court at this time, rests almost entirely upon the construction of a written contract which defines the relations of these parties. There is some verbal testimony on this subject introduced by defendant before the policy itself was introduced by the plaintiffs. As regards that testimony, I am inclined to think that some of it would be pertinent, even after the introduction of the policy, and to that alone I will advert in what I have to say about the construction of this policy. I may as well state at the start, however, that the two opposing views which are taken of the contract are these: the one by the plaintiff that it was simply an agreement, not for a partnership, but for the future organization of a joint-stock corporation, in which, when completed and organized, these goods shall constitute a part of the capital stock; but that, not having done so before the fire, no such change of the policy alluded to was made in the ownership of the property or its possession, but that the original partners were the sole owners at the time of the fire. This agreement, therefore, requires a somewhat critical examination. It says:

"This agreement, made and entered into this twenty-fourth day of May, 1883, by and between E. J. A. Drennan, F. W. Starr, and Edward Everett, who are members and constitute the firm of Drennen, Starr & Everett, all of Minneapolis, parties of the first part, and D. M. Arndt, of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part agree to receive into their business said Arndt on the following conditions: Said Arndt is to pay into said firm for its use, on or before June 14, 1883, five thousand dollars, and said Arndt is to pay into said firm for its use, on or before January 1, 1885, an additional sum of five thousand dollars," etc.,—the contract being signed by E. J. A. Drennen, F. W. Starr, and D. M. Arndt.

It is observed that Mr. Everett's name is not signed to this instrument; and, if nothing more had been said about it, I should have said the instrument was void. But Mr. Drennen stated on the stand that Mr. Everett was away from home when the contract was signed, and that, when he returned home, he was informed of it and assented to it. Mr. Drennen and other witnesses testified that Mr. Arndt was in the office as book-keeper, and on this point there is no contradictory evidence. I say to the jury now, and I think they are authorized to assume, that Mr. Everett was a party to this contract; so that question may be considered out of the way.

Considering this, then, to be the instrument of Drennen, Starr & Everett on the one hand, and of Mr. Arndt on the other, we are of the opinion that it takes Mr. Arndt into the partnership on the day he paid the $5,000, and gave his note for the other $5,000. It provides for his having an interest in the whole firm, as I understand it, upon the payment of that money. The testimony is that his cash payment of $5,000 was made on the fourteenth day of June, and he made the note for $5,000 a day or two afterwards, which was accepted by the plaintiffs. The language of this instrument is "to pay into the firm"—the firm then in existence—"for its use," on or before June 14, 1883. There was no firm that he could have paid it into except the firm of Drennen, Starr & Everett. He was to pay into that firm for their use $5,000; and that there may be no mistake about it, this is repeated: "Said Arndt is to pay the said firm for its use, on or before the first day of January, 1885, an additional sum of $5,000." The books of the partnership and the book-keeper are introduced, and the payment of that money into the firm, as entered on their books, is found; the execution of the note and its credit is

found on these books of the firm of Drennen, Starr & Everett. I cannot resist the conclusion that a primary object of this contract was, in its own language, that the said parties of the first part (that is, Drennen, Starr & Everett) were to receive into their business said Arndt, and that when he paid that money as a condition of his being received into that business, he was paying it to said firm for *its* use, and not to the corporation to be formed; that it was to the firm of Drennen, Starr & Everett he was to pay $5,000 "for its use," on or before June 14, 1883, which he did, and that he was to pay into such firm for its use on or before January 1, 1885, an additional sum of $5.000, by note, which he did, and which note they might have sold and discounted, (although it was testified that they have returned it to him,) and this was the formation of the partnership. He was received into their business,—not a future business; he paid the money into them,—the firm,—and not the corporation to be formed. The basis of his interest is not calculated on what may have been the intention to put into the joint-stock corporation to be afterwards formed, but it was based on the condition of the firm of Drennen, Starr & Everett on the first of January, six months before, when they had taken stock, and an inventory of their debts, credits, and property, and they said: "We have now a surplus of $65,000, and on that basis we take you into this firm. You have paid your money; you have been received into the firm." He acted as a member of the firm for two or three weeks before the fire. I must hold that by this contract he came into and became a member of the partnership of the old firm, with the same rights, in proportion to the amount of interest which he had, as the other three members of the firm. His money had been invested in the goods then there. He purchased an interest in the goods and in their debts, and incurred an obligation for debts owing on the first of January, 1883. That is our view of the case.

I shall simply say to the jury that if they believe this testimony of Miss Alice O'Brien, and the books that have been produced, and if they believe Mr. Drennen's testimony that Mr. Everett consented to this arrangement made by his two partners with Mr. Arndt, that that transaction constituted a partnership in which Mr. Arndt became interested in these goods, and in such manner as to avoid the policy, their verdict should be for the defendant.

ARGUMENT.

Upon this record the following questions arise:

First—Did Arndt become a partner in the firm of Drennen, Starr & Everett, and in the insured property, under the agreement in the bill of exceptions dated May 24, 1883?

Second—If he did become such partner, did this insurance become void by reason of the conditions of the policies hereinbefore set out?

I.

We submit with great confidence that this contract, considered alone and without any reference at present to the practical construction given to it by the parties, constituted Arndt a partner in the firm of Drennen, Starr & Everett, and in the insured property, upon the payment of $5,000 and the giving his note for $5,000 to Drennen, Starr & Everett. The paper is inartificially drawn; but, nevertheless, a fair construction of all its provisions points to the above conclusion; and a contrary conclusion drawn from these provisions makes the contract absurd and unbusiness-like.

That it was the intention of the parties to this contract to constitute Arndt a partner in the firm of Drennen, Starr & Everett is apparent from its first sentence. E. J. A. Drennen, F. W. Starr, and E. D. Everett are stated to be *now* members of and constituting the firm of Drennen, Starr & Everett, parties of the first part, and they agree "to receive into their business said Arndt on the following terms and and conditions." Here, then, is the purview of this contract, and it is that three members of the firm now existing agree to receive a fourth party into their business. If it had ever been the understanding of the parties that this agreement was solely for the future formation of a corporation, and that until such formation Arndt was to have no interest in the business or property which was the subject of the agreement, the parties would have used, almost necessarily, in this introductory clause of the contract, some language from which such an intention could be inferred.

It is not stipulated that Arndt is to be received into the corpora-

tion. No time is stated when the corporation should be formed. Such statement as to time of formation was not particularly material, if, as we contend, Arndt was, up to the time when it should be formed, a partner in the existing firm.

Again, taking up the next sentence of this contract, it provides that "*said company* is to become incorporated." These words are connected by direct reference to the next preceding sentence, which we have considered.

What company was to be incorporated? Not the firm formerly composed of the individuals Drennen, Starr, and Everett, but the company which was composed of these three individuals and Arndt, whom Drennen, Starr, and Everett had received "into their business." The court will observe, in the clause under consideration, that the word "company" is used, while throughout this contract, where it refers to the former firm, the word "firm" is used.

The next provision of the contract provides for the manner in which the former firm of Drennen, Starr & Everett shall be paid by Arndt as a consideration for his reception into "their business." Arndt is to pay into said firm, (not into said company to be incorporated,) for its use, on or before June 14, 1883, $5,000. Arndt is to pay into said firm, (not into said company to become incorporated,) on or before January 1, 1885, an additional sum of $5,000. Arndt is to pay said firm interest, at the rate of 8 per cent. per annum, on each of said sums of five thousand dollars, from January 1, 1883, till each of said sums shall be paid as aforesaid; the interest on the sum last mentioned to be paid semi-annually.

In construing these stipulations the court below forcibly observed:

"The language of this instrument is 'to pay into the firm,'—the firm then in existence,—'for its use, on or before June 14, 1883.' There was no firm that he could have paid it into except the firm of Drennen, Starr & Everett. He was to pay into that firm, for their use, $5,000; and, that there may be no mistake about it, this is repeated: 'Said Arndt is to pay the said firm, for its use, on or before the first day of January, 1885, an additional sume of $5,000.' The books of the partnership and the book-keeper are introduced, and the payment of that money into the firm, as entered on their books, is found; the execution of the note and its credit is found on these books of the firm of Drennen, Starr & Everett. I cannot resist the conclusion that a primary object of this contract was, in its own language, that

the said parties of the first part (that is, Drennen, Starr & Everett) were to receive into their business said Arndt, and that, when he paid that money as a condition of his being received into that business, he was paying it to said firm for its use, and not to the corporation formed; that it was to the firm of Drennen, Starr & Everett he was to pay $5,000, 'for its use,' on or before June 14, 1883, which he did; and that he was to pay into such firm, for its use, on or before January 1, 1885, an additional sum of $5,000, by note, which he did, and which note they might have sold and discounted, (although it is testified that they have returned it to him,) and this was the formation of the partnership. He was received into their business,—not a future business; he paid the money into them,—the firm,—and not the corporation to be formed. The basis of his interest is not calculated on what may have been the intention to put into the joint-stock corporation to be afterwards formed, but it was based on the condition of the firm of Drennen, Starr & Everett on the first of January, six months before, when they had taken stock, and an inventory of their debts, credits, and property, and they said: 'We have now a surplus of $65,000, and on that basis we take you into this firm.' He acted as a member of the firm for two or three weeks before the fire."

In the fifth clause of the contract it is provided: "If said Arndt shall be unable to pay said second five thousand dollars by January 1, 1885, his interest shall be decreased 50 per cent." This does not refer to the interest in the stock of the corporation, because there is a further and separate provision that when the charter shall be procured 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. The reduction of his interest in the corporation is fully provided for by the latter clause; hence, unless the words "his interest shall be decreased 50 per cent." refer to his interest in the partnership, they have no meaning whatever, and are entirely superfluous. If Arndt had no interest in the partnership, there was, of course, nothing to be decreased by 50 per cent. In that case there would be no subject-matter on which that clause of the contract could operate.

The next paragraph of the contract fixes the basis or valuation of assets upon which Arndt is to be received into the business. He was received into their business,—not a future business; he paid the money into them,—the firm,—and not the corporation to be formed. The basis of this interest is not calculated on what may have been

the intention to put into the joint-stock corporation to be afterwards formed, but it was based on the condition of the firm of Drennen, Starr & Everett on the first day of January, six months before, when they had taken stock, and an inventory of their debts, credits, and property. They in effect said: "We have now a surplus of $65,000; you pay in $10,000, and on that basis we take you into this firm, and receive you into our business." If Arndt did not acquire a partnership interest in the existing business, why is it provided that he should suffer a deduction for non-payment of any claim for goods sold by Drennen, Starr & Everett prior to January 1, 1883?

The last paragraph of the contract provides as follows:

"It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed." Page 29.

This provision makes Arndt the book-keeper and office man of the firm of Drennen, Starr & Everett, just as clearly as it gives him those positions in the corporation to be formed, and each *remaining* partner of the firm of Drennen Starr & Everett shall actively engage in the business of the new company. Unless it was the intention of the parties to admit Mr. Arndt into their business as a partner and co-owner, it was entirely superfluous to provide that no change in the name or character of the firm of Drennen, Starr & Everett should be made until said corporation shall be formed. Unless Arndt was admitted as a partner it is obvious that there could be no change in the partnership name or character, and the clause was introduced to provide for the common case of partnerships where the name of one or more actual partners does not appear in the partnership style. The phraseology of this sentence can lead to no other conclusion. It contemplates a partnership of four persons; the duties of the partner Arndt are specifically provided for, and then there is a provision for the duties of each of the "*remaining*" partners of the firm of Drennen, Starr & Everett. This language is meaningless if the theory is adopted that the original firm

of Drennen, Starr & Everett had undergone no change by the introduction of Arndt as partner.

Having paid ten thousand dollars into this firm, Arndt must have occupied one of two positions. He was either a partner, having the interest and rights of a partner, or he was a creditor of Drennen, Starr & Everett. If he was a partner, the relations of the parties to each other were clear and well defined; if he was a creditor, the parties to this contract have contrived a situation full of difficulties and business absurdities.

Is it consistent with the intention of the parties that Arndt, by his payment of money and by his removal from Sandusky, Ohio, to Minneapolis, Minnesota, became merely a creditor of Drennen, Starr & Everett? If he was a creditor, we should expect to find that the parties would name some time at which the loan should be due. But the contract names no time; therefore, if he was a creditor, his debt was due and payable on demand. He might have brought an action at law against Drennen, Starr & Everett, to recover his ten thousand dollars, upon the first or any subsequent day after he invested. It was obviously the intention to found a permanent business, and the intention of Arndt to become interested permanently in that business. Nothing can be more clear than that it was not the intention of Drennen, Starr & Everett to become liable to repay this ten thousand dollars to Arndt upon demand, or at any fixed future date. If Arndt was a creditor, we should expect, moreover, to find Drennen, Starr & Everett agreeing to pay him interest on his money. On the contrary, the contract expressly provides that Arndt shall pay Drennen, Starr & Everett interest from a date six months prior to this investment.

The case of *Syers* v. *Syers*, 1 L. R. App. Cas. 174, is precisely in point. In that case the appellant was the lessee of the Oxford Music Hall and Tavern. Being in want of a ready sum of money he applied to his brother, the respondent, for an advance of 250 pounds. A paper was drawn up and signed by the parties in the following terms: "In consideration of the sum of 250 pounds this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tav-

ern, to be drawn up under the limited partnership act of the 28 & 29 Viet. *c.* 86, called an 'Act to amend the law of partnership.'" The money was advanced, and the speculation became successful. The case is precisely analogous to this in that the deed of copartnership under the limited liability act was never executed. Here the contract to form a corporation was never executed. In the Syer case the business ran for some time in the name of the appellant, and no deed of copartnership under the limited liability act was ever drawn up. In a suit for a receiver, and for an accounting of profits, and an interest, and a recovery of an interest in the assets of the Oxford Music Hall and Tavern, it was held by the house of lords that the memorandum of agreement above quoted did not constitute the respondent a creditor of the appellant, but that even before the organization under the limited partnership act the parties were general partners *inter sese*, and joint owners of the assets and property of the concern, and jointly entitled to the profits, *and a decree for accounting was granted accordingly*.

There is another difficulty in looking upon Arndt as a mere creditor of Drennen, Starr & Everett. Suppose before the corporation was formed one member of the concern had died, and the formation of the corporation had, from this cause, become impossible. What would be Arndt's position? Would he be entitled to bring an action at law to recover his ten thousand dollars? Obviously not! We think his only remedy would be in equity for winding up the partnership and an accounting.

There is still another difficulty if Arndt was not a partner. The contract provides that 50 per cent. of his stock shall be held in trust by said company, or some one in trust for it, until said second sum of $5,000, with accruing interest, shall be paid. This was a proper provision to secure his copartners after the time when the assets of the firm should be transferred to the copartner. Up to that time his copartners were secured by their lien as partners, and by the special agreement that his interrest should be reduced fifty per cent.

But, if the contention of the plaintiffs in error is correct, *there was no security for Arndt* for the time which must intervene before the formation of the corporation. On that theory he paid in $10,000 absolutely upon a mere executory promise to form a corporation at

some future time not specified,—a promise which he could not have specifically enforced by suit.

Pomeroy, Contracts, § 290.
2 Lindley, Part. p. 918.
Stocker v *Wedderburn*, 3 K. & J. p. 393.
Maxwell v. *Port Tenant Co.* 24 Beavan, 495.
Sheffield Gas Co. v. *Harrison*, 17 Beavan, 294.
Bluck v. *Mallalue*, 27 Beavan, 398.

If it had been intended by this contract only to provide for a future interest in a corporation to be formed, the contract would have prescribed that Arndt's $10,000 should be held in trust by some person to be paid to Drennen, Starr & Everett when the corporation should be formed and the assets transferred to it.

We have thus far discussed this contract simply upon its terms. Taking into consideration the subject-matter, the situation of the parties, and the construction which they gave to this contract, the conclusions which we have submitted are strongly re-enforced. It appears (folio 71) that on the eighteenth day of June, 1883, the plaintiffs in error received from Arndt the sum of $5,000 in money, which sum of $5,000 was thereupon placed to the credit of Arndt's individual name upon the account-books of said plaintiffs, and was by them deposited in their bank; that on the third day of July, 1883, Arndt executed to the plaintiffs his promissory note for $5,000, payable 18 months after date, which was also entered upon the account-books of the plaintiffs to the credit of Arndt's individual name, and was received by them as other bills receivable were received by them in their business. Arndt came from his home in Sandusky, Ohio, to the place of business of the plaintiffs in error, whereupon the negotiations which resulted in the contract were had about May 20, 1883. (Folio 72.) That immediately after making and signing said agreement, Arndt went to Sandusky, and returned therefrom again to Minneapolis, June 7, 1883. He paid the money and executed the note, and they were received by the plaintiffs in error under and pursuant to said agreement, and not otherwise. (Folio 77.)

These transactions, taken in connection with the agreement, are reconcilable with no theory other than that Arndt purchased a pres-

ent interest as partner in the business of Drennen, Starr & Everett—"their business"—and paid therefor a present consideration.

If it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they pursued.

Chapman v. *Bluck*, 4 Bing. N. C. pp. 187–195.

Where the words of an instrument are ambiguous, the court will call in aid acts done under it as a clue to the intention.

Doe v. *Ries*, 8 Bing. 181.

Contemporaneous usage is a strong ground for the interpretation of doubtful words or expressions.

Per *Cottenham*, L. C., in *Drummond* v. *Attorney General*, 2 H. L. Cas. 861.

Circumstances attending a transaction may be called in aid to explain the nature of dealings between parties where otherwise an ambiguity hangs over them.

Lieber, Herm. p. 300, Appendix.

Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed; and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.

Nash v. *Towne*, 5 Wall. p. 699, opinion.

Where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect.

Railroad v. *Trimble*, 10 Wall. 367.

"Can it be ascertained from the terms of the lease, aided by the light derived from the evidence in the cause? We think it can. And in making this inquiry, we have a right to examine into the state of things existing at the time, and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject-matter of the agreement."

Canal Co. v. *Hill*, 15 Wall. pp. 100, 101, opinion.

II.

If our conclusions, as above stated, are correct, it follows that a change had taken place in the title and possession of this property, and that the interest of the assured became other than the entire unconditional and sole ownership of the same, and the policies were therefore avoided under the operation of each of the conditions contained in them. We can best enforce this proposition by reference to the language of the court below, in its opinion, which is given in full in antecedent pages of this Brief.

The conclusions of Justice Miller are amply sustained by authorities.

The language of the provisions of the policy is too clear and explicit to allow any question of construction to be raised. Ownership and possession by Drennen, Starr & Everett, and Arndt, as partners, is a different ownership and possession from that existing when the policy was issued. Property owned by Drennen, Starr & Everett is insured, and it is stipulated that any change in such ownership or in their possession shall render the policy void.

This case cannot be brought within the range of those decisions where it has been held, generally under dissimilar clauses, that a transfer by one of several joint owners jointly insured to another owner, who is also insured by the same policy, does not viatiate the policy. Those cases proceed upon the theory that by such a transfer no stranger to the insurance is brought in as owner of the property; that is, as the insurance company had been satisfied to insure the joint owners, a transfer among such owners would not be presumed to be forbidden, but that the clause in question would be satisfied by

applying it to a case like the present, where a new owner has been introduced. The theory is that the insurance company has the right to say with whom it will contract, and in whom it will rest its confidence; in whom it will repose the trust of bearing for it the moral hazard incident to the insurance. Any process by which a new party to the contract is introduced, by which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation which the company has not consented to assume.

Lockwood v. *Ins. Co.* 47 Conn. 564, is not in point. The provision in that policy was that when the property should be alienated by sale, or otherwise, the policy should thereupon be void. Quite a different provision from the clause in question. One tenant in common of real estate transferred his interest to a co-tenant, and it was held the policy was not avoided.

In a subsequent case of *Malley* v. *Ins. Co.*, decided by the supreme court of Connecticut at the June term, 1883, reported in 13 Ins. L. J. p. 38, the precise question here involved was decided, and the rule which we contend for fully sustained.

In the case of *Hoffman* v. *Ins. Co.* 32 N. Y. 405, the policy contained a condition making it null and void if the property should be sold or conveyed. It was held that a sale by a retiring partner of his interest to his copartners, who were all jointly insured, did not render the policy void. This case is on all-fours with the Lockwood case in Connecticut. The opinions in the above cases of Lockwood and Hoffman draw a distinction between those cases and cases like the one at bar, and sufficiently show the opinion of both those learned courts, that a clause, such as occurs in this policy, would be violated by the introduction of a new partner into the property without the consent of the insurer.

Burnet v. *Eufala*, 46 Ala. 11, is a case which held a transfer by one partner to another, both being insured, was not a violation of the clause, "If the said property shall be sold or conveyed, or the interest of the parties therein changed." This decision is clearly distinguishable from the case at bar; but Mr. Wood says that that case carries the doctrine further than was warranted by the cases to which it referred as authority, and further than the rules of fair construction would permit; that the interest of the parties was clearly changed

when the part owner became sole owner, or when one joint owner parted with any part of his joint interest in that property.

Wood on Fire Ins. p. 560, sec. 334.

In *Pierce* v. *Ins. Co.* 50 N. H. 299, the supreme court of New Hampshire said: "Such a condition is inserted for the benefit and protection of the company against the risk of having careless or improvident persons substituted in the place of the original parties with whom they contract."

In *West* v. *Ins. Co.* 27 Ohio St. 11, it is said that the chief reason for requiring such a stipulation is to guard against the introduction of a stranger.

Dix v. *Ins. Co.* 22 Ill. 272, is opposed to the Alabama case, and it was there held that the insurers may be as greatly prejudiced by removing one to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger; that, therefore, under a clause similar to the one in question, a transfer from one partner to another vitiated the policy. To the same effect is *Barnes* v. *Ins. Co.* 51 Me. 110.

Ins. Co. v. *Rice*, 23 Ind. 179.
Finley v. *Ins. Co.* 30 Pa. St. 311.
Ins. Co. v. *Ricker*, 10 Mich. 279.

In *Day* v. *Ins. Co.* 23 Barb. 623, it was held that an assignment from one partner to a stranger to the contract avoided the policy.

In *Wood* v. *Ins. Co.* 31 Vt. 552, the court say, when one partner sells to his associates there can be no recovery by the old firm for a subsequent loss. Where there is a voluntary change of the firm, the insurance company may also well say that the new firm is not the party with whom they contracted."

Keeler v. *Ins. Co.* 16 Wis. 523.
Ins. Co. v. *Hauslein*, 60 Ill. 521.
Lappin v. *Ins. Co.* 58 Barb. 325.

In *Card* v. *Ins. Co.* 4 Mo. App. 424, the court held that the introduction of a new partner was such a change of title and possession as to avoid the policy.

In *Dreher* v. *Ins. Co.* 18 Mo. 128, the court held that where two insured partners dissolved and divided the property, converting the joint ownership into a several ownership, such a change of title would vitiate the policy.

Savage v. *Ins. Co.* 52 N. Y. 502.
Pindar v. *Ins. Co.* 47 N. Y. 114.
Briggs v. *Home Ins. Co.* 88 N. C. 141.
Oakes v. *Ins. Co.* 181 Mass. 164.

III.

We will briefly consider one proposition of the plaintiffs in error, which, perhaps, is not disposed of by what has already been admitted by us.

It is not correctly stated in their Brief (p. 21) that by the terms of the argument "Arndt was to pay $5,000, with eight per cent. interest, from January 1, 1883, on or before June 14, 1883."

The contract reads, (pages 28, 29:)

"*Second.* Said Arndt is to pay into said firm for its use, on or before June 14, 1883, five thousand dollars."

* * * * * * * *

"*Fourth.* Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum, on each of said sums of five thousand dollars, from January 1, 1883, till each of said sums should be paid as aforesaid, the interest on last-mentioned sum to be paid semi-annully."

Folio 73.

It will thus be seen that while a time was definitely fixed (viz., June 14, 1883) for the payment of the first five thousand dollars, no time was fixed for the payment of interest on that installment. The most that can be claimed is that it was payable on demand.

The plaintiffs in error having received this five thousand dollars and the note for $5,000, and showing no demand for interest, are to be held to have waived the payment of the interest. They have always retained the $5,000 cash and the $5,000 note, and they will not be permitted, without having offered to return these, to insis that this contract never became operative.

We do not think the payment of the $5,000 was a condition pre-

cedent; but even if it is such a condition, by reason of the fact that a date is fixed at which it shall be paid, no such time is fixed as to the payment of the interest.

Courts lean in favor of a subsequent rather than a precedent condition, because the latter tends to defeat the operation of the contract.

Pomeroy, Contracts, sec. 338.

"If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent; and, unless it be performed, the devisee can take nothing. If, on the contrary, the act does not *necessarily* precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent."

Per Cur. Finlay v. *King's Lessee*, 3 Pet. 375, opinion.

But, we repeat, the plaintiffs in error having taken the main benefits of the contract,—enormously more valuable than the amount of the interest,—cannot insist on the failure to pay interest or a failure to perform a condition precedent. This principle is clearly expressed by Mr. Anson in his work on Contracts, p. 298:

"But it must be borne in mind that a condition precedent may change its character in the course of the performance of a contract; and that a breach which would have effected a discharge, if treated as such at once by the promisee, ceases to be such if he goes on with the contract and takes a benefit under it. This aspect of a condition precedent is pointed out by *Williams, J.*, in *Behn* v. *Burness*, 3 B. & S. 756, where he speaks of the right of the promisee, in the case of a broken condition, to repudiate the contract, 'provided it has not already been partially executed in his favor;' and goes on to say that if after the breach the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty in the sense that it can only be used as a means of recovering damages. An illustration of such a change in the effect of a condition is afforded by the case of *Pust* v. *Dowie*, 32 L. J. Q. B. 179, 285. The defendant chartered the plaintiff's vessel for a voyage to Sydney. He promised to pay £1,550 in full for this use of the vessel, on condition of her taking a cargo of not less than 1,000 tons weight and measurement. The charterer had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action for non-pay-

ment of the freight, the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition. 'It is not easy to see,' said *Blackburn, J.*, 'what is meant by these latter words, unless they import a condition in some sense; and if, when the matter was still executory, the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, I will not say that he might not have been justified in repudiating the contract altogether; and in that case the condition would have been a condition precedent in the full sense.' He then quotes with approval the *dicta* of *Williams, J.*, in *Behn* v. *Burness*, and goes on to say: 'No doubt that principle is adopted from the judgment of Lord *Wensleydale*, in *Graves* v. *Legg*, 9 Exch. 709, and this distinction will explain many of the cases in which, although there appears to have been a condition precedent not performed, a party having received part of the consideration has been driven to his cross-action. Now, is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single ton (which would be enough to support the plea) is to prevent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of *Behn* v. *Burness*.'"

"It is said that where the clause in question goes to the whole of the consideration, it shall be read as a condition. The meaning of this must be that if the supposed condition covers the whole ground of the contract, and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party the right of avoiding or rescinding it altogether. But where the supposed condition is distinctly separable, so that much of the contract may be performed on both sides as though the conditions were not there, it will be read as a stipulation, the breach of which only gives an action to the injured party."

2 Parsons, Contracts, (6th Ed.,) p. 527, citing
Boone v. *Eyre*, 1 H. Bl. 273, note *a*.
Hemans v. *Picciotto*, 1 C. B. (N. S.) p. 646.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1884.

(No. 935.)

EUGENE J. A. DRENNEN, FREDERICK W. STARR, AND EDWARD D. EVERETT, PARTNERS AS DRENNEN, STARR & EVERETT,

Plaintiffs in Error,

vs.

THE LONDON ASSURANCE CORPORATION,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

The counsel for plaintiffs in error deem it proper to add by way of supplemental brief to their principal brief in this court, the following:

The stipulation was first made in the circuit court for the submission of this cause under rule twenty of the rules of the supreme court. That stipulation contemplated the filing of briefs by both parties by the first Monday in November. Owing to a misunderstanding which arose between the counsel and the clerk of the

supreme court, the record was not printed in the cause until about November 1st; the counsel for plaintiffs in error, however, went on and prepared and filed their brief pursuant to the aforesaid stipulation, and therefore necessarily without having the printed record before them, so that they were unable to refer to particular pages or folios in the printed record as they otherwise would have done. Afterwards by a new stipulation, filed with clerk of supreme court, the time for filing briefs was extended to December 1st We have now received such record, also the brief of defendant in error. We beg leave to supply herein that deficiency, and add a few suggestions in reply to the brief of the defendants in error.

REFERENCES TO PRINTED RECORD.

a. The complaint is found on pages 3 to 5, folios 7 to 13, inclusive, of printed record.

b. The policies of insurance annexed to complaint are found on pages 5 to 17, folios 16 to 31, inclusive, and the particular conditions of said policies involved in this action are, as to first policy in No. 1, on page 6, and No. 4, on page 7; and as to second policy in No. 1, on page 12, and No. 4, on page 13, of printed record.

c. The answer is found on pages 23 and 24, folios 52 to 62, of printed record.

d. The bill of exceptions is found on pages 27 to 31, folios 68 to 82, inclusive, of printed record.

e. The contract between plaintiffs and D. M. Arndt, set out in said bill, is found on pages 28 and 29, folios 72 to 76, of printed record.

f. The requests of plaintiffs to charge, which were refused, and the charges given by the Court as to which the exceptions of plaintiffs were taken, together with said exceptions, are found on pages 30 and 31, folios 78 to 81, of printed record.

SUGGESTIONS IN REPLY.

Counsel for defendant, on page 13 of their brief, say, "If it had ever been the understanding of the parties that this agreement was solely for the future formation of a corporation, and that until such

formation Arndt was to have no interest in the business or property which was the subject of the agreement, the parties would have used, almost necessarily, in this introductory clause of the contract, some language from which such an intention could be inferred."

We do not perceive why such language should necessarily appear in the *introductory* clause. If it is found anywhere in the agreement it would be sufficient.

But by a curious oversight the learned counsel, in attempting to quote the opening clause of this contract, omit the very expression which does infer this very intention, to-wit: The very first of the following conditions in these words, "such company is to become incorporated." We have before attemped to point out on pages 9 to 16 of our principal brief, that not only these words, but the concluding words and various expressions between the first and last words, point unmistakably to the intention for which we contend. The learned Judge below in rendering his opinion seemed also to have overlooked this clause.

Again on page 14 they concede that the words "said company" in said clause, means the company to be formed by plaintiffs *and* Arndt. If this is so, does it not follow that one of the conditions was, that the company into which Arndt was to be received was to be an *incorporated company*, and not a partnership.

Then follows a quotation from the opinion of the learned Judge below, in which are some expressions of matters which had been referred to, which were excluded from the case, and not incorporated in the bill of exceptions because so excluded. The bill of exceptions expressly states that the evidence incorporated therein was all that was received or considered upon the trial, and what we are now considering is whether *that* evidence, being all that was received and all that is to be considered, justified the instructions given by the court to the jury.

The remark of the learned judge that "the basis of his, Arndt's interest, is not calculated on what may have been the intention to put into said stock corporation to be afterwards formed, but was based upon the condition of the firm of Drennen, Starr & Everett on the first of January, six months before," is we submit, not justified by any thing appearing in the written contract. The statement in

said contract in that regard is, as we have before pointed out, only as a basis for estimating and ascertaining what should be the amount and measure of the *interest of the plaintiffs* in the stock of the corporation to be formed.

On page 15 of their brief counsel for defendant say, that the clause in the contract "if Arndt shall be unable to pay said second five thousand dollars by January 1, 1885, his interest shall be decreased 50 per cent." does not refer to the interest in the stock of the corporation, "because there is a further and separate provision that when the charter shall be procured 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000.00 with accruing interest thereon shall be paid."

We do not understand this. It seems to us that the "because" which they give is rather a reason for the inference that the contingent inability of Arndt to pay the said $5,000, by January 1st, 1885, does refer to a reduction of his interest in *the stock of the corporation*. The contract provides in substance that the stock for one-half of his interest in the corporation shall be issued and placed in trust for him, and that if he does not pay for it by January 1st, 1885, he shall not have it.

The real and principal consideration urged by them is, that Arndt *must* be considered either as a partner, *with* or a creditor *of* plaintiffs, and then proceed to argue that he could not be the latter. We will answer all this by simply saying that the true relations of the plaintiffs and Arndt, pending the formation of the corporation, were those of two contracting parties who had agreed to form a business relation of a certain character upon certain terms. Arndt had probably performed the conditions on his part so far, that had he paid the interest due as provided for by the contract, he would have been in a condition to demand of plaintiffs a performance on their part, and upon a failure by them to so perform within a *reasonable time*, he might recover from them in damages, certainly the money he had paid them, with interest, and probably whatever other damages he could show he had suffered by their refusal.

The last consideration urged by defendants which we will attempt to notice, is that of the contemporaneous exposition of this contract

by the acts of the parties. The only act, as we have before pointed out, was the reception of the money and note by plaintiffs, *as provided in the contract.* If the contract *provides* that the payment of the money shall constitute Arndt a partner presently with plaintiffs, then defendant is right; if it does not, defendant is not right. The contract not only does not so provide, but as we have before said and say again, is only the method and terms appointed by the parties in and upon which Arndt should be entitled to receive stock in the corporation which it was agreed should be organized.

The case of Syers vs. Syers, cited by defendant, is not in point. That was an agreement in terms to *form a partnership* prescribing precisely what share the incoming partner should have in the profits of the business. They went on and did business, and profits were realized. As *between them* equity decreed that the contract which they had agreed should be executed was executed upon the familiar maxim *Equity presumes that has been done which ought to be done.*

Here was no contract to form a partnership. There is no evidence that business was done or profits realized, and this is a suit at law in which the defendant is seeking to establish a partnership *inter sese* between the plaintiffs and a third party, to avoid its own contract. It could scarcely invoke the equitable powers of the court to decree a specific performance of a contract for partnership (even if there was such) which had not been concluded between the parties to it. It does not require argument to show the total dissimilarity of the two cases.

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SHAW & CRAY and
GEO. B. YOUNG,
of Counsel.